

PUBLIC PROSECUTOR v. AZMY ARIFF

[R.Cr.J. (Hashim Yeop A. Sani J.) December 29, 1973]
[Kuala Lumpur — Selangor Criminal Revision No. 24 of 1973]

Criminal Law and Procedure — Plea of guilty by letter — Whether person charged under Income Tax Act, 1967 can plead guilty by letter — Criminal Procedure Code (F.M.S. Cap. 6), s. 137(ii).

Income Tax Act, 1967, s. 86(1) — Plea of guilty by letter — Whether magistrate can accept.

The respondent had been charged with an offence under section 86(1) of the Income Tax Act, 1967. He pleaded guilty by letter and the learned magistrate accepted the plea and ordered the respondent to be admonished and discharged. Section 137(ii) of the Criminal Procedure Code allows a plea of guilty by letter only where the offence is punishable by fine only or imprisonment not exceeding three months or both.

Held: as the offence in this case was punishable with a fine not exceeding \$1,000 or with imprisonment not exceeding six months or with both, section 137(ii) of the Criminal Procedure Code could not apply and the learned magistrate was wrong in accepting the plea of guilty by letter.

CRIMINAL REVISION.

Lamin bin Haji Mohamad Yunos (Deputy Public Prosecutor) for applicant.

Respondent in person.

Hashim Yeop A. Sani J.: The defendant before the magistrate was the precedent partner of a partnership charged for failing to submit a partnership return of income for the year of assessment 1972 under section 86(1) of the Income Tax Act, 1967, thereby committing an offence punishable under section 120 of that Act. The defendant pleaded guilty by letter. The magistrate, on the date fixed for hearing, accepted the plea; and on the strength of the plea in mitigation set out in the letter (to the effect that the accountant of the firm had been sick) ordered that the defendant be admonished and discharged.

The question here is whether the magistrate could lawfully accept the plea of guilty by letter after considering the provisions of section 120 of the Income Tax Act, 1967, read with section 137(ii) of the Criminal Procedure Code, F.M.S. Cap. 6. The ancillary question is whether section 137(ii) of the Criminal Procedure Code applies in the case of a law (like the Income Tax Act, 1967) which is silent on the right of a person to plead guilty by letter for an offence under that law.

As regards the main question, the magistrate was wrong in accepting the plea of guilty in this case. For section 137(ii) of the Criminal Procedure Code to apply, the punishment for the offence must be either a fine only or imprisonment only of a term not exceeding three months or both fine and imprisonment not exceeding three months; whereas punishment for an offence under section 86(1) of the Income Tax Act, 1967 is prescribed in section 120 of that Act which is a fine not exceeding \$1,000 or to imprisonment for a term not exceeding six months or to both. Therefore section 137(ii) of the Criminal Procedure Code does not apply in this case.

With regard to the ancillary question where a law is silent on the question of plea of guilty by letter, it is obvious that section 137(ii) of the Criminal Procedure Code should apply provided that the punishment for the offence is within the scope of that section. The

A word "offence" in the Criminal Procedure Code is defined to mean any act or omission made punishable by any law for the time being in force. The Criminal Procedure Code is of general application in criminal procedure. The provisions of section 137(ii) of the Criminal Procedure Code would apply unless expressly excluded. The fact that there is a power to compound (section 124 of the Income Tax Act, 1967) does not, in my view, alter the position. The power to compound under that section is exercisable only before a conviction.

Section 137(ii) of the Criminal Procedure Code provides in clear terms that an accused person "desiring to plead guilty and be convicted and sentenced in his absence" may by letter addressed to the magistrate plead guilty and submit to pay any fine which may be imposed in respect of the offence and that section likewise in clear terms provides also that the magistrate may thereupon record a plea of guilty and convict him according to law. Therefore the magistrate has no alternative but to record the plea and convict the person before passing the appropriate sentence.

The order of the magistrate is therefore quashed and the case shall be sent back to the magistrate to be dealt with according to law.

Order accordingly.

PUBLIC PROSECUTOR v. YAP KOK MENG

[A.Cr.J. (Hashim Yeop A. Sani J.) January 8, 1974]
[Kuala Lumpur — Criminal Appeal No. 57 of 1973]

Criminal Law and Procedure — Charges of possession of arms and of ammunition — Charge should contain sufficient particulars — Summary trial — Application to recall prosecution witness — Refusal by President of Sessions Court — Trial unsatisfactory — Criminal Procedure Code (F.M.S. Cap. 6), ss. 153(i), 173 and 316(a).

In this case the respondent had been charged with possession of arms and possession of ammunition, offences under the Arms Act, 1960. At the trial, the prosecuting officer applied to recall a prosecution witness before the close of the prosecution case. The learned president of the Sessions Court refused the application.

Held: the refusal to allow the witness to be recalled was unjustified and as in the circumstances the learned president had not heard all the evidence of the prosecution, a retrial would be ordered.

Cases referred to:-

- (1) *Pan Kok Wah v. Public Prosecutor* [1966] 2 M.L.J. 141.
- (2) *Neo Koon Cheo v. R.* [1959] M.L.J. 47.
- (b) *Mee Lian Co. v. Public Prosecutor* [1962] M.L.J. 131.

CRIMINAL APPEAL.

Yaacob bin Haji Ismail (Deputy Public Prosecutor) for the appellant.

J. Nadchatiram for the respondent.

Hashim Yeop A. Sani J.: This is an appeal by the Public Prosecutor against the order of acquittal by the learned President of the Sessions Court, Rawang. The respondent, Yap Kok Meng, was charged in the Sessions Court, Rawang with two offences under section 9(a) of the Arms Act, No. 21 of 1960. The charges read as follows:—

- (1) "That you between 27.9.72 at about 6.30 p.m. and 8.05 a.m. 22.12.72 at Batu 14 KL-Ipoh Road, Rawang, in the District of Ulu Selangor, in the State of Selangor, have in your control a .25 Colt Automatic pistol No. 396334 without being in possession of an arms licence or a arms permit and that you have thereby committed an offence punishable under section 9(a) of the Arms Act No. 21 of 1960."
- (2) "That you on the same date, time and place, have in your control 5 rounds of .25 ammunition without being in possession of an arms licence or a arms permit and that you have thereby committed an offence punishable under section 9(a) of the Arms Act No. 21 of 1960."

At the close of the prosecution case, the learned President acquitted and discharged the respondent of both charges without calling for his defence.

The facts of this case according to the evidence are as follows:—

Acting on information, PW1 together with a party of police officers raided house No. 28, Dusun Nyior, Seremban on 22nd December, 1972 at about 2.30 a.m. Upon knocking at the front door of the premises, PW1 heard running foot-steps at the back portion of the house. PW1 then ran to the back portion of the house and saw the respondent running away, who was subsequently arrested about 50 yards from the house. PW1 interrogated the respondent on the spot in the Hokkien dialect. The respondent then led PW1 and the police party to the 14th milestone Kuala Lumpur-Ipoh Road, Rawang, at a spot where there was a big tree and a lot of bushes. PW1 conducted a search and found a .25 Colt automatic pistol (exhibit P1) loaded with a magazine containing five .25 bullets (exhibit P2). In his grounds of judgment, the learned President came to the conclusion that the respondent's knowledge of the existence of P1 and P2 in itself is insufficient to render a person guilty of the offences.

The Deputy Public Prosecutor in the petition of appeal sought to rely on the following grounds:—

- "(i) The learned president erred in law in not calling upon the accused to enter upon his defence.
- (ii) The learned president erred in fact and in law in finding that 'the prosecution have failed to establish beyond reasonable doubt that the accused was in control of P1, (Pistol) and P2 (5 rounds of ammunition) between 6.30 p.m. on 27.9.72 and 8.05 a.m. on 22.12.72 as alleged in the charges'.
- (iii) Having correctly directed himself that 'control' is not synonymous with 'possession' the learned president then misdirected himself on the meaning of the former term.
- (iv) The learned president erred in law and in fact in not finding that the accused had control of the pistol and the 5 rounds of ammunition merely because they 'were found almost 55 miles away from where the accused was arrested and at a jungle fringe which was obviously accessible to anyone'."

During the hearing of the appeal, Encik Yaacob Ismail, the Deputy Public Prosecutor arguing the appeal, submitted that the appeal was partly for the purpose of obtaining a judicial ruling on the distinction between "possession" and "control" under the Arms Act, 1960, as there has been no decided case on this point. The learned Public Prosecutor also referred to *Pan Kok Wah v. Public Prosecutor*,⁽¹⁾ where the learned judge held that the learned President in that case was wrong in thinking that control is synonymous with possession under the Excise Act, 1961. A Singapore case, *Neo Koon Cheo v. Reg.*,⁽²⁾ was also referred to

A for the meaning of "custody", "control" and "possession" under the Dangerous Drugs Ordinance, (Cap. 137) of Singapore.

After hearing the submissions, I drew the attention of both counsel to what appeared in the records of the instant case, namely:—

- B (i) the vague wording relating to the period and time of the alleged offences in the charges; and
- (ii) the notes of the learned president relating to the application by the prosecuting officer to apply for the recall of PW1 to ascertain certain facts. Recorded was the objection of the defence counsel and the subsequent refusal of the learned president to allow the recall of PW1 'in the interest of justice' on the ground that PW1 had been in court and had heard the testimony of PW3.

- C It is fundamental in the system of justice as we know it that a person accused of a criminal offence must be informed clearly of the charge made against him. The first charge in the instant case commences with the words "That you between 27 September 1972 at about 6.30 p.m. and 8.05 a.m. 22 December 1972 at Batu 14 Kuala Lumpur-Ipoh Road, Rawang...".
- D These words are unclear and can be construed in various ways and to that extent the charge was badly drafted. The Criminal Procedure Code states in clear terms in section 153(i) that the charge shall contain such particulars as to the time and place of the alleged offence and the person, if any, against whom or the thing, if any, in respect of which it was committed as
- E are reasonably sufficient to give the accused notice of the matter with which he is charged. Any charge which is not in conformity with this is bad. The fact that counsel for the accused had not drawn the attention of the learned President in the first instance will not alter the position. It is a fundamental rule that an allegation must be stated with sufficient precision
- F to enable the accused to meet the allegation. I would also like to repeat the words of Adams J. in *Mee Lian Co. v. Public Prosecutor*⁽³⁾ that it is also the duty of the court to see that a charge is properly drawn at the time it is read and explained to the defendant.

- Equally a fundamental question here was the unjustifiable refusal to allow a witness from giving his evidence at the trial. In this case, it was clear from the records that the application by the prosecuting officer to recall PW1 was made before the close of the prosecution case. The objection of the defence counsel on the ground that PW1, after giving his evidence, was allowed to remain in court and therefore had heard the evidence of PW3 was misconceived. The learned
- H President, in allowing the objection, confused the admissibility of evidence with the weight to be given to an evidence. PW1, if allowed to be recalled, could have given evidence which might well have assisted the learned president in determining the issue before him and to that extent he had, in my view, lost the opportunity to come to a proper conclusion.

- I I do not think it appropriate, having regard to the records before me, to dwell on the question of the law relating to the word "control" of section 9(a) of the Arms Act, 1960, and to dispose of the appeal accordingly. After going through the records of the instant case, my decision on this appeal must be based on the more fundamental question of failure of the learned president to allow the recall of PW1 on the application

of the prosecuting officer. Section 316(a) of the Criminal Procedure Code provides that the judge may, in an appeal from an order of acquittal, reverse such order, and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law. In my view, this is a fit and proper case to be ordered for re-trial as the learned president had not heard all the evidence of the prosecution which he should have heard before coming to a proper conclusion.

Re-trial ordered.

Solicitors: *J. Nadchatiram & Co.*

TENGKU MAHMOOD v. PUBLIC PROSECUTOR

[A.Cr.J. (Raja Azlan Shah F.J.) January 9, 1974]
[Kota Bharu — Criminal Appeal No. 17 of 1972]

Criminal Law and Procedure — Appeal — Demeanour of witness to be tested against totality of his evidence — Evidence of accomplice — Charge of corruption — No corroboration — Whether trial court justified in convicting accused — Prevention of Corruption Act, 1961.

This was an appeal against the conviction of the appellant on a charge of accepting an illegal gratification, an offence under the Prevention of Corruption Act, 1961. The learned president of the Sessions Court had convicted the appellant on the uncorroborated evidence of the complainant, as he accepted the complainant as a witness of truth.

Held: on the facts the complainant in this case was an accomplice whose whole interest in giving evidence against the appellant must have been to make his case as black as possible to achieve his objective. Since the learned president had failed to take a critical appreciation in his examination of the complainant's evidence, he had not taken proper advantage of his having seen and heard him, so that his mistaken view had coloured his approach to the issue of credibility so gravely that there was such a misdirection that made the judgment wholly unsatisfactory. The appeal must therefore be allowed and the conviction quashed.

Cases referred to:-

- (1) *Tara Singh v. Public Prosecutor* [1949] M.L.J. 88, 89.
- (2) *Rex v. Ambler* (1938) 2 W.W.R. 225.
- (3) *Trowell v. Public Prosecutor* [1946] M.L.J. 41.
- (4) *Thong Hong Kee v. Public Prosecutor* [1952] M.L.J. 110.
- (5) *Lim Kwee Geok v. Public Prosecutor* [1953] M.L.J. 50.

CRIMINAL APPEAL.

Edgar Joseph Jr. for the appellant.

Hashim Majid (Deputy Public Prosecutor) for the respondent.

Raja Azlan Shah F.J.: The appellant was convicted of agreeing to accept from the complainant a gratification of \$800, an offence under section 4(a) of the Prevention of Corruption Act, 1961. He was sentenced to imprisonment for one day and a fine of \$2,000 in default 9 months. He has appealed against conviction.

The evidence shows the salient facts of the prosecution case to be as follows: The appellant was a member of the Kelantan State Public Services Commission, who in March 1971 had interviewed the complainant for a job as tracer in the Survey Department. He was not successful. In June 1971 he made a second

application. In early September 1971 he enlisted the help of an intermediary, PW6, to introduce him to the appellant. On 18 September 1971, together with PW6 he visited the appellant at his house with an offering of rice pulot and eggs. There it is said the alleged agreement to pay the appellant a sum of \$800 as inducement to help him get the job was reached. The money was to be handed to PW6 in 15 days' time (3 October 1971) and the venue was the appellant's house. The complainant made a report (not produced because inadmissible) with the local branch of the Anti-Corruption Agency not immediately after the said occurrence but 13 days later (30 September 1971). A police trap was then set on 15 October 1971. \$800 notes treated with anthracine were handed to the complainant with instructions to hand them to PW6 who in turn would, according to the said agreement hand them to the appellant. However, the trap proved abortive. It was alleged that the complainant handed the money to PW6 but there was no evidence to that effect. At that material time the appellant was not in his house. He returned a little later. He was searched by the police but nothing incriminating was found on him. The members of his household were also searched but with the same result. His house was meticulously searched from morning till dusk but the money was not found. In the course of the trial the credit of PW6 was impeached by the prosecution.

The central question to be considered in this appeal is whether on the record, as it stands, the learned president was right in accepting the complainant as a witness of truth.

As regards authority, there is, I think, very little to be said. It is hardly necessary to go further back than *Tara Singh v. Public Prosecutor*⁽¹⁾ in 1948. In that case it was held that impression as to demeanour of a witness must be critically tested against the totality of his evidence. Now, the learned president, it is true, had a great advantage over this court. He saw and heard the witness and I did not. But the demeanour is not always the touch-stone of truth. It is only one ingredient in arriving at a finding of credibility. But so also is motive. Although in cases of this kind it is not easy to get satisfactory evidence, one must not also lose sight of the fact that at the same time it is indeed easy to 'fix' a man in the position of the appellant. A man who was not successful before the Public Services Commission may have hurt his pride and hurt pride is a ferocious beast. It is for this reason that a judge of fact should always test the complainant's evidence against the totality of his evidence and the probabilities of the case. Failure to do so does amount, in my view, to a misdirection, and if it can be demonstrated that the trial judge had failed to do that, his conclusion as to credibility, cannot, in justice, be regarded as impeachable, much less unimpeachable. It would therefore be not just for an appellate court to regard itself as compelled to regard as conclusive his finding on the issue of credibility. The whole matter can be considered afresh. Further, the graver the issue involved, and particularly when an allegation of corruption is in the air, the greater is the necessity for the appellate court to enquire whether the conclusion as to credibility is one that must under the law be regarded as, for all practical purposes, irrefragable.